

No. 51

# TRANSCRIPT OF RECORD.

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United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

JULY TERM, 1892.

AMERICAN MORTGAGE CO. OF SCOTLAND (Limited),

*Appellant,*

vs.

ERVEN O'HARRA, *et al.*

*Appellees.*

EQUITY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

We certify the within is substantially a correct Record of the Transcript on Appeal, and contains substantially all that is material on the Appeal.

For Appellant.

For Appellees.

FILED  
MAY 21 1892



IN THE  
United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT.

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AMERICAN MORTGAGE CO. }  
  *Appellant,* }  
  *vs.* } EQUITY.  
ERVEN O'HARRA, *et al.* }  
  *Respondents.* }

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TRANSCRIPT ON APPEAL FROM OREGON.

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IN THE CIRCUIT COURT OF THE UNITED STATES FOR  
THE DISTRICT OF OREGON.

OCTOBER TERM, 1885.

Be it remembered, that on the 16th day of December, 1885, there was duly filed in the Circuit Court of the United States for the District of Oregon, a bill of complaint, in words and figures as follows, to-wit:

COMPLAINANT'S BILL.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR  
THE DISTRICT OF OREGON.

To the Judges of the Circuit Court of the United States for the District of Oregon.

The American Mortgage Company of Scotland, Limited, a corporation duly incorporated under the laws of the United Kingdom of Great Britain and Ireland, and having its head or principal office in Edinburgh, Scotland, and a subject of her majesty, Queen Victoria, ruler of the United Kingdom of Great Britain and Ireland, brings this, its bill, against Erven O'Harra and Julia O'Harra his wife, D. K. Smith, Thomas F. Rourke and Lillian C. Rourke his wife, of Umatilla County in the State of Oregon and citizens of the State of Oregon, and thereupon your orator complains and says :

1. That on or about the 21st day of April 1883, the defendants Erven O'Harra and Julia O'Harra made, executed and delivered to your orator in consideration of one thousand dollars certain promissory notes which are in substance as follows: One note for the sum of one thousand dollars being the principal of said consideration and due and payable on the 1st day of November, 1886, and four interest notes being numbered respectively 1, 2, 3 and 4, and for the respective sums of No. 1, for Thirty-two and 80-100 dollars and being interest on said principal sum from the 21st day of April, 1883, to the 1st day of November, 1883. Nos. 2, 3 and 4 each being respectively for one hundred dollars, and being interest on said principal sum of one thousand dollars for the period of twelve months next preceding the date of its falling due in the order of their numbering as follows: No. 1, on the 1st day of November, 1883; No. 2, on the 1st day of November, 1884; No. 3, on the 1st day of November, 1885; No. 4, on the 1st day of November, 1886, with interest at the rate of ten per cent. per annum from date of maturity and each and every of said notes payable at the office of your orator in Edinburgh, Scotland.

2. That to secure the payment of said promissory notes and interest thereon according to the terms thereof, defendants, Erven O'Harra and Julia O'Harra his wife, for and in consideration of the said sum of one thousand dollars on or about the 21st day of April, 1883, made and executed under their hands and seals their certain mortgage, and said defendants, Erven O'Harra and Julia O'Harra, duly acknowledged said mortgage so as to admit and entitle the same to record, which said mortgage the said defendants, Erven O'Harra and Julia O'Harra, then and there delivered to your orator.

3. That the said defendants, Erven O'Harra and Julia O'Harra, did by said mortgage grant, bargain, sell and convey unto your orator with covenants that the said defendants were lawfully seized of the premises thereby conveyed, and had at the time of the execution and delivery of said mortgage a valid and unincumbered fee simple title to said premises, and that said defendants would, and their heirs, executors and administrators should forever warrant and defend said premises against all lawful claims and demands whatsoever. That the said defendants, Erven O'Harra and Julia O'Harra, by said mortgage conveyed to your orator the following described premises and real estate situate in the County of Umatilla, and State of Oregon, and described as follows, to-wit: The northwest quarter of section two, in township four north, range thirty-two east of the Willamette meridian, containing one hundred and sixty acres, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining.

4. That said mortgage being so duly made, executed and delivered and acknowledged as aforesaid by the said defendants, Erven O'Harra and Julia O'Harra, was duly recorded in the records of said Umatilla county, Oregon, on page 773, *et sequi* Book "F," Records of Mortgages, of said Umatilla county, State of Oregon, on or about the 21st day of May, 1883.

5. That it was intended by said Erven O'Harra and Julia O'Harra to have mortgaged the following lands, viz.: The southwest quarter of section two, in township four north, range thirty-two east, of the Willamette meridian, containing one hundred and sixty acres, instead of the land embraced in your orator's mortgage, and by an error and through mistake the said Erven O'Harra and Julia O'Harra gave said mortgage on lands they had no interest in whatever, but intending and supposing at the time that they were mortgaging the lands last described, and your orator intended to acquire a mortgage of the lands last described as owned by said Erven O'Harra and Julia O'Harra as it was the sole security relied on for the payment of said notes. That said error occurred through no fault of your orator, but through the error and fault of said Erven O'Harra. That at the time of the execution of said mortgage and notes one J. H. Cavanagh was transacting business for said Erven O'Harra, and between your orator and O'Harra, and had sent an application to your orator for said advance of money, and such application contained the erroneous description, and the said mortgage was prepared in accordance with same and sent to said Cavanagh, who had said mortgage executed and recorded as aforesaid. That at the time of their execution and since the defendant D. K. Smith was manager for said Cavanagh and transacted various kinds of business for him, and among other things saw to the execution of notes and mortgages and other business connected with same, and in such capacity discovered the error and mistake that had been made in said defendants O'Harra mortgaging the wrong land, and thereupon said D. K. Smith advised your orator thereof and requested that another mortgage be sent on to correct the error, thereupon one was sent with instructions to have same duly executed by said Erven O'Harra and Julia O'Harra. Afterwards said D. K. Smith instead of seeing to and obtaining the execution of a new mortgage upon the last lands described and with knowledge and notice of all the facts hereinbefore set out and fraudulently and with intent to defraud your orator, obtained a deed of conveyance of said tract of land last described, which deed was dated September 20, 1884, and made by said Erven O'Harra and Julia O'Harra, his wife, to said D. K. Smith, and was duly recorded on page 298 of Book "L," Records of Deeds of said Umatilla county. That on or about the

22d of September, 1884, said Smith with intent to defraud your orator and put said land so conveyed to him beyond the reach of your orator, conveyed same by deed, dated September 22, 1884, and recorded at page 302 of Book "L," Records of Deeds, of said Umatilla county, on September 23, 1884, to Thomas F. Rourke, and your orator charges that said Rourke before and at the time of accepting said deed had knowledge and notice of the facts hereinbefore set out, and took said lands over from said D. K. Smith with intent to defraud your orator and to defeat its mortgage, and your orator believes that said conveyances to Smith and Rourke were fraudulent and made without value or consideration, and your orator further says that said mortgage ought to be reformed and corrected and made a first lien and charge upon said lands last described in the hands of said Thomas F. Rourke and are and ought to be subject to all terms and conditions of said mortgage.

6. That said mortgage was upon these express conditions: That if said defendants, Erven O'Harra and Julia O'Harra, should pay each and every of said promissory notes, and do and perform all other things therein required or agreed to be performed in all manner as required or agreed, then said mortgage to be void and of no effect. But if said defendants, Erven O'Harra and Julia O'Harra, should fail to pay or cause to be paid each and every of said notes in all manner in accordance with the terms thereof and the terms of said mortgage, or should fail to perform any other thing therein required or agreed to be performed, then upon the failure of said defendants, Erven O'Harra and Julia O'Hara, to fully comply with the terms of said mortgage and of said notes in any respect or particular, it might be optional with your orator, its legal representatives and assigns to at any time after such failure declare the whole of said principal sum being at the time when the whole amount is declared due and unpaid, at once due and payable, as also all interest thereon up to the date when payment of the whole amount thus becoming due shall be made, or up to the date when judgment therefor and decree of foreclosure of said mortgage shall be entered, and that your orator, its legal representatives or assigns after such failure, at its or their option, might proceed to foreclose said mortgage to compel payment to be made of the full amount due and payable. And it was further agreed and provided as an essential part of said mortgage, as and for the purpose of holding your orator, its legal representatives and assigns harmless, and securing it or them against being put to any cost or expense by reason of having to foreclose said mortgage because of default of said defendants, Erven O'Harra and Julia O'Harra, in doing or causing to be done in all manner as required or agreed to be done, that in case foreclosure proceedings

should become necessary, that there should be taxed as part of the cost of foreclosure proceedings an attorney's fee of twenty per cent. on the whole amount due on said notes and said mortgage in addition to the taxable costs and disbursements.

7. That the conditions of said mortgage have been broken, and default has been made in payment of said promissory notes Nos. 2 and 3 by the said defendants, Erven O'Harra and Julia O'Harra, in this, that the said defendants, Erven O'Harra and Julia O'Harra, have failed and neglected to pay said promissory notes Nos. 2 and 3 as aforesaid, which said notes are each for the respective sum of one hundred dollars in United States gold coin, and were due and payable as follows: No. 2 on the 1st day of November, 1884; No. 3 on the 1st day of November, 1885.

8. That no part of said sums for which said promissory notes were made have been paid except said promissory note No. 1, for the sum of Thirty-two and 80-100 dollars.

9. That there is due and owing to your orator said sum of one hundred dollars in United States gold coin, together with interest thereon from the 1st day of November, 1884, at the rate of ten per cent. per annum, and the sum of one hundred dollars in United States gold coin, together with interest thereon from the 1st day of November, 1885, at the rate of ten per cent. per annum, and the sum of one thousand dollars in United States gold coin, together with interest thereon from the 1st day of November, 1885, at the rate of ten per cent. per annum.

10. That the said defendants, Erven O'Harra and Julia O'Harra, are husband and wife.

11. That this suit is necessarily instituted to collect said sums of money due and payable and unpaid upon said notes and mortgage, and said attorney's fee of twenty per cent. on the whole amount due on said notes and said mortgage has been earned and is due according to the conditions of said mortgage, and your orator is entitled to have and recover of and from said defendants, Erven O'Harra and Julia O'Harra, said sum of twenty per cent. to be taxed as costs in this suit or proceeding.

12. That by reason of the premises the said mortgage has become absolute and all the notes are declared due and said mortgage ought to be foreclosed.

13. That your orator is the owner and holder of said notes and said mortgage.

14. That the defendants Thomas F. Rourke and Lillian C. Rourke are husband and wife, and are the owners of the lands last described.

15. That said defendants, D. K. Smith, Thomas F. Rourke and Lillian C. Rourke, have or claim to have some interest in said premises, but that said interest and claim is subsequent in time and inferior in right to that of your orator.

16. That your orator has no plain, adequate or speedy remedy at law.

Wherefore your orator prays a decree of this Honorable Court.

First — That said mortgage may be reformed and corrected and made to embrace and include the said lands last described, and that the same may be held by said Thomas F. Rourke subject to said mortgage, and that it may be declared a first lien thereon for the amount of said notes, and that said Thomas F. Rourke may be declared the trustee of said D. K. Smith as to said last mentioned lands, and that same may be held subject to said mortgage as a first lien thereon. Second — For the sum of one thousand dollars in United States gold coin, with interest thereon in like gold coin at the rate of ten per cent. per annum from the 1st day of November, 1885. Third — For the sum of one hundred dollars in United States gold coin, with interest thereon in like gold coin at the rate of ten per cent. per annum from the 1st day of November, 1884. Fourth — For the sum of one hundred dollars in United States gold coin, with interest thereon in like gold coin at the rate of ten per cent. per annum from the 1st day of November, 1885. Fifth — For the sum of twenty per cent. on the amounts for said attorney's fee mentioned in said mortgage. Sixth — For costs and disbursements of this suit.

Second — That the usual decree may be made for the sale of said premises by the Master of this Court according to the practice and course of this Honorable Court, and that the proceeds of said sale may be applied in payment of the amounts due to your orator, and that said defendants and all persons claiming under them or either of them subsequent to the execution of said mortgage upon said premises either as purchasers, incumbrancers or otherwise may be forever barred and foreclosed of all right, claim or equity of redemption in said premises and every part thereof, and that your orator may have judgment and execution against the said defendants, Erven O'Harra and Julia O'Harra, for any deficiency which may remain after applying all the proceeds of said sale of said premises properly applicable to the satisfaction of said judgment.



Third — That your orator or any other party to this suit may become a purchaser at said sale. That the Master of this Court make, execute and deliver a deed of conveyance in due form to the purchaser, and that said purchaser be let into possession of the premises on production of a deed of conveyance therefor.

Fourth — That your orator have such other and further relief as may seem meet and equitable to this Honorable Court.

Fifth — May it please your Honors to grant unto your orator the writ of subpœna of the United States of America, to be directed to the said defendants, Erven O'Harra, Julia O'Harra, D. K. Smith, Thomas F. Rourke and Lillian C. Rourke, thereby commanding them and every of them at a day certain and under a certain pain therein to be specified personally to be and appear before your Honors in this Honorable Court, and then and there to answer all and singular the premises and to stand to, perform and abide such order and decree therein as to your Honors shall seem meet and your orator will ever pray.

C. J. McDOUGALL,

J. M. BOWER,

*Solicitors for Complainant.*

( Endorsed : ) Filed December 16, 1885. R. H. Lamson, Clerk.

(TITLE.)

SUBPŒNAS AD RESPONDENDUM were issued and served.

(TITLE.)

SEPARATE ANSWER OF THOMAS AND LILLIAN ROURKE.

The separate answer of Thomas F. Rourke and Lillian C. Rourke, defendants, to the bill of complaint of the American Mortgage Company of Scotland, Limited, complainant.

The said defendants now and at all times hereafter saving and reserving to themselves all manner of benefit and advantage of exceptions to the many errors and insufficiencies in the complainant's said bill of complaint, for answer hereunto, or unto so much and such parts thereof as the said defendants are advised is material to them or either of them to make answer unto.

They answer and say that these defendants deny that they have any knowledge or information sufficient to form a belief as to whether or not it was intended by said Erven O'Harra and Julia O'Harra, or either of them, to have mortgaged the lands alleged in the bill of complaint, viz.: The southwest quarter of section two, in township four

north, range thirty-two east of the Willamette meridian, containing one hundred and sixty acres, or any part thereof, instead of the lands embraced in the complainant's said mortgage, or that by error or through mistake the said Erven O'Harra and Julia O'Harra, or either of them gave said mortgage on lands they had no interest, or that they or either of them, the said Erven O'Harra and Julia O'Harra, intending or supposing at the time, or any time, that they were mortgaging the lands last described, or that the complainant intended to acquire a mortgage of the lands above described as owned by said Erven O'Harra and Julia O'Harra, or that it was the sole security relied on for the repayment of said notes, or that said error or any error occurred through the error or fault of said Erven O'Harra.

And defendants deny that they have any knowledge or information sufficient to form a belief as to whether or not at the time of the execution of the mortgage and notes mentioned in the complainant's bill of complaint, at any time one J. H. Cavanagh was transacting business for said Erven O'Harra, or between the complainant and Erven O'Harra, or had sent an application to said complainant for said or any advances of money, or that such application contained the erroneous description, or that the said mortgage or any mortgage was prepared in accordance with the same or sent to said Cavanagh, who had said mortgage executed or recorded as aforesaid or otherwise.

And defendants deny that they have any knowledge or information sufficient to form a belief as to whether or not, at the time of the execution of said mortgage and notes, or since or at any time, the defendant, D. K. Smith, was manager for said Cavanagh, or transacted various or any kinds of business for him, or, among other things, saw to the execution of notes or mortgages or other or any business connected with same, or that he in such capacity, or any capacity, or at all discovered the error or the mistake that had been made in said defendant, O'Harra, mortgaging the wrong land, or that he thereupon or at any time advised complainant thereof, or requested that another mortgage be sent on to correct the error, or that thereupon or at any time one was sent with instructions or otherwise to have same duly or otherwise executed by said Erven O'Harra or Julia O'Harra.

And defendants deny that they have any knowledge or information sufficient to form a belief as to whether or not afterwards or at any time said D. K. Smith instead of seeing to or obtaining the execution of a new mortgage upon the lands last described in the complainant's bill of complaint, or with knowledge or notice of all or any of the facts alleged in the bill of complaint, fraudulently or with intent to defraud complainant of said tract of land last described in the

bill of complaint, obtained a deed of conveyance of said tract of land which deed was dated September 20th, 1884.

And these defendants and each of them deny that on the 22d day September, 1884, or at any other time said Smith, with intent to defraud complainant or put said land so conveyed to him beyond the reach of complainant, conveyed same by deed dated September 22, 1884, or any date, or recorded at page 302, of Book "L" of Records of Deeds, of said Umatilla county, on September 23, 1884, to defendant Thomas F. Rourke, and defendants and each of them deny that said Rourke before or at the time of accepting said deed or any deed of conveyance of said land had knowledge or notice of the facts or any facts alleged in complainant's bill of complaint, or that he took said lands over or from said D. K. Smith with intent to defraud complainant or to defeat its mortgage, or that said conveyance to Smith or Rourke or either of them were or are fraudulent or were made without value or consideration, and defendants deny that said mortgage ought to be reformed or corrected or made a first or any lien or charge upon said lands last described in the hands of Thomas F. Rourke, or that they are or ought to be subject to all or any terms or conditions of said mortgage.

And defendants admit that they have an interest and claim in the lands above described, but the defendants deny that said interest or claim is subsequent in time or inferior in right to that of the complainant.

And these defendants further, answering the complainant's bill of complaint, allege that on the 22d day of September, A. D. 1884, the defendant Thomas F. Rourke bargained and contracted with the defendant D. K. Smith for the sale and purchase of the lands hereinbefore described, and that by the terms of said bargain and contract the said D. K. Smith agreed to convey to the defendant Thomas F. Rourke the said lands for and in consideration of the sum of three thousand dollars.

And that in pursuance of said bargain and contract and in consideration of the said sum of three thousand dollars said defendant D. K. Smith did on the said 22d day of September, 1884, convey by deed said premises to this defendant T. F. Rourke, which said deed was duly acknowledged, so as to be entitled to record, and the same was on the 23d day of September, 1884, duly recorded in the office of the county clerk of Umatilla county, in Book "L," Records of Deeds, of said county of Umatilla, at page 302, and that the defendant T. F. Rourke did at said date and in consideration therefor actually pay said D. K. Smith the sum of three thousand dollars United States gold coin, as follows :

One thousand dollars cash in hand paid and his, the defendant Thomas F. Rourke's, negotiable promissory note for the balance of two thousand dollars, which said note was afterwards and before the commencement of this suit, and before said defendant had any notice of said mortgage or alleged lien, fully paid and satisfied. And that at the date of said contract and sale and purchase the defendant T. F. Rourke had no knowledge whatever of the existence of complainant's said mortgage or the alleged or any error therein or of complainant's alleged claim or interests in or lien upon said lands, and that defendant purchased said lands for the valuable and valid consideration aforesaid and in good faith.

That prior to the execution and delivery of said deed by Smith to Rourke, and the payment of the purchase price aforesaid, the defendant Thomas F. Rourke had and caused the records of conveyances and mortgages of Umatilla county to be examined by a competent attorney, and that no lien or incumbrance was found to exist upon said records against said lands. And that acting upon the faith of such examination and record the defendant purchased said premises and paid for the same as aforesaid, without any knowledge or notice of the existence of complainant's said mortgage, or alleged errors therein, or alleged interest in or claim or lien upon the lands aforesaid

And these defendants deny all unlawful combination and confederacy in the said bill charged without that, that any other matter or thing material or necessary for these defendants to make answer unto, and not herein or hereby well and sufficiently answered unto, confessed or avoided, traversed or denied, is true to the knowledge or belief of these defendants.

All which matters and things these defendants are ready to aver, maintain and prove as this Honorable Court shall direct, and humbly pray to be hence dismissed with their reasonable costs and charges in that behalf most wrongfully sustained.

THOMAS F. ROURKE,  
LILLIAN C. ROURKE,

JOHN J. BALLERAY,

*Defendants.*

*Solicitor for Defendants T. F. and L. C. Rourke.*

#### REPLICATION.

REPLICATION to the foregoing answer was filed. Afterward and on June 7, 1889, a petition for leave to file a supplemental bill was filed, an order therefor made, and on July 29, 1889, such supplemental bill was filed, the principal defendants and Oliver Cheeley, Christina Cheeley, Thomas Thompson and J. C. Long being made parties thereto, which supplemental bill is as follows :

## (TITLE.)

## SUPPLEMENTAL BILL.

To the Honorable Judges of the Circuit Court of the United States for the District of Oregon.

The American Mortgage Company of Scotland, Limited, by leave of Court first thereto duly obtained, would present this its supplemental bill against Erven O'Harra, Julia O'Harra, D. K. Smith, Thomas F. Rourke, Lillian C. Rourke, defendants in said suit heretofore, and against Oliver Cheeley and Christina Cheeley, citizens of the State of Oregon and residents at Helix, in this district, and J. C. Long, a citizen of Oregon residing at Milton, in this district, and Thomas Thompson, a citizen and resident of the State of Oregon and residing at Pendleton, in this district, which last named defendants are made parties defendant hereto by said order of Court above referred to, and thereupon your orator complains and alleges :

That the original bill in this case was brought by your orator to foreclose a mortgage to secure the payment of the sum of \$—— made upon the 21st day of April, 1883, and interest thereon at the rate of —— per cent. per annum until paid. Which said mortgage was made by Erven O'Harra and wife, and was intended by both parties thereto to cover and mortgage unto your orator the following described real estate, to-wit : The southwest quarter of section two, township four north, range thirty-two east, containing one hundred and sixty acres. That said property was then owned by said Erven O'Harra, but by mistake and inadvertance the same was described in your orator's said mortgage as follows, to-wit : The northwest quarter of section two, in township four north, range thirty-two east of Wilamette meridian, containing one hundred and sixty acres.

And your orator's said bill was also brought to correct said mortgage so that the same should describe the property so owned by said O'Harra and intended to be mortgaged, and to decree the sale of the same for the satisfaction of your orator's said mortgage.

That since the commencement of this suit the said defendants, Thomas F. Rourke and Lillian C. Rourke, his wife, have conveyed the real estate intended to be mortgaged to the complainant, and sought to be sold under foreclosure proceedings and set forth in the original bill, to the defendant Christina Cheeley, the wife of Oliver Cheeley, who now holds the legal title to the same. That said transfer and conveyance to said Christina Cheeley was made and received by said Christina Cheeley with full knowledge of your orator's rights in the

premises and full knowledge of your orator's claim of lien upon said real estate as set forth in the original bill, and your orator further shows that J. C. Long has since the commencement of this suit obtained a judgment in the Circuit Court of the State of Oregon for Umatilla county against said Thomas F. Rourke for the sum of \$——, and thereby claims a lien upon said real estate intended to be mortgaged to your orator and sought to be subjected to your orator's mortgage as set forth in the original bill. That said judgment was obtained by said Long with full knowledge of the rights and claims of your orator in and to said property as set forth in the original bill. That the defendant Thomas Thompson claims a lien upon said property by virtue of a mortgage for \$1,000 executed to him thereon by said Oliver Cheeley and Christina Cheeley, his wife, since the conveyance of said real estate to said Christina Cheeley.

That said defendant, Thomas Thompson, received said mortgage with full knowledge and notice of your orator's rights and claims of lien upon said real estate.

And your orator alleges that the interests, claims and liens of the said defendants, Christina Cheeley, Oliver Cheeley, her husband, J. C. Long and Thomas Thompson, are subsequent to and subject to your orator's rights and claim of lien upon said real estate.

And your orator prays that the decree of the Court herein shall adjudge that the interest and title of said Christina Cheeley and Oliver Cheeley, her husband, in and to said real estate, and the claim of lien of said defendant, J. C. Long, thereon, and the claim of lien of said Thomas Thompson thereon be each and all decreed to be subsequent and subject to your orator's lien by virtue of its mortgage and the facts and matters set forth in its original bill.

To the end therefore that the said Christina Cheeley and Oliver Cheeley, her husband, and the said J. C. Long and the said Thomas Thompson may, if they can show why your orator should not have the relief prayed for herein, may it please your honors to grant to your orator the most gracious writ of subpœna issuing out of this Court, and addressed to said Christina Cheeley and Oliver Cheeley, J. C. Long and Thomas Thompson, commanding them, and each of them, to appear herein at a time therein to be named, and upon their corporal oaths, true and perfect answers make to the best of their and each of their knowledge, information and belief, to the matters and things in this supplemental bill set forth, and in default thereof to abide such order and decree of this Honorable Court as shall be meet and pursuant to equity.

And your orator prays such further relief as shall pertain to equity. Thereafter and on September 7, 1889, the following answer to the supplemental bill was filed :

## (TITLE.)

## ANSWER OF THOMAS F. AND LILLIAN C. ROURKE, OLIVER AND CHRISTINA CHEELEY, AND THOMAS THOMPSON TO SUPPLEMENTAL BILL.

The answer of Thomas F. Rourke, Lillian C. Rourke, Oliver Cheeley, Christina Cheeley and Thomas Thompson, defendants to the supplemental bill of complaint of the American Mortgage Company of Scotland, Limited, complainant.

The defendants now, and at all times hereafter, reserving to themselves all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainant's said supplemental bill of complaint, for answer thereto and to so much and such parts thereof as the said defendants are advised is material for them or either of them to make answer unto. They answer and say that these defendants deny that they have any knowledge or information sufficient to form a belief as to whether or not it was intended by defendants, Erven O'Harra and Julia O'Harra, or either of them to have mortgaged the lands alleged in the bill of complaint and supplemental bill of complaint of Plaintiff herein, viz.: The southwest quarter of section two, township four north, range thirty-two east of the Willamette meridian, containing one hundred and sixty (160) acres, or whether or not by mistake and inadvertance, or by mistake or inadvertance the same was described in the complainant's said mortgage as the northwest quarter of section two, in township four north, range thirty-two east of the Willamette meridian, containing one hundred and sixty acres.

Defendants admit that since the commencement of this suit the defendants Thomas F. Rourke and Lillian C. Rourke have conveyed the real estate mentioned in plaintiff's bill of complaint, and therein alleged to be the land intended to be mortgaged to complainant, to the defendant Christina Cheeley, wife of Oliver Cheeley, and that said Christina Cheeley now holds the legal title to the same, but defendants deny that said transfer or said conveyance to said Christina Cheeley was and received or made or received by said Christina Cheeley with full or any knowledge of complainant's alleged rights in the premises or full or any knowledge of the complainant's claim of lien upon said real estate.

Defendants deny that J. C. Long has since the commencement of this suit or at all obtained a judgment in the Circuit Court of the State of Oregon for Umatilla county or elsewhere against said Thomas F. Rourke for the sum of \$——— or any other sum of money.

Admits that Thomas Thompson claims a lien upon the said property by virtue of a mortgage for \$1,000.00 executed to him thereon by said Oliver Cheeley and Christina Cheeley, his wife, since the conveyance of said real estate to said Christina Cheeley, but defendants deny that said defendant, Thomas Thompson, received said mortgage with full or any knowledge of the complainant's rights or claims of lien upon said real estate or with any notice thereof, except such notice as may arise constructively from the pendency of complainant's suit.

That these defendants allege that said conveyance of said land made by the defendants Thomas F. Rourke and Lillian C. Rourke to said Christina Cheeley was by deed of warranty by which said defendants, Thomas F. Rourke and Lillian C. Rourke, covenanted to and with said Christina Cheeley that said premises were free from all encumbrances and that by reason of said covenants said Thomas F. Rourke and Lillian C. Rourke have an interest in this suit and should be entitled to a hearing on their answer to the complaint in this suit and a trial of the issues raised thereby, and these defendants deny that the interests, claims or liens of the said defendants, Christina Cheeley, Oliver Cheeley, Thomas Thompson, Thomas F. Rourke and Lillian C. Rourke, or any or either of them are subsequent to or subject to the complainant's rights or claim or lien upon said real estate or any part thereof. That at the time of said conveyance of said real estate by said Thomas F. Rourke and Lillian C. Rourke to the said defendant, Christina Cheeley, the said Thomas F. Rourke was the owner in fee simple of said real estate, free from the lien of complainant's said mortgage, and had full right and lawful authority to convey the same to the said defendant, Christina Cheeley, for that on the 22d day of September, A. D. 1884, the said defendant, Thomas F. Rourke, bargained and contracted with the defendant D. K. Smith for the sale and purchase of the lands hereinbefore described, and by the terms of said bargain and contract the said D. K. Smith agreed to convey to the defendant Thomas F. Rourke the said lands for and in consideration of the sum of three thousand dollars, and that in pursuance of said bargain and contract and in consideration of the sum of three thousand dollars, said defendant D. K. Smith did on said 22d day of September, A. D. 1884, convey by deed said land and premises to the said defendant, Thomas F. Rourke, which said deed was duly acknowledged so as to be entitled to record, and the same was on the 23d day of September, A. D. 1884, duly recorded in the office of the county clerk



of Umatilla county, in Book "L," of Records of Deeds, for said county of Umatilla, on page 302, and that said defendant, Thomas F. Rourke, did at said date and in consideration of said conveyance pay to said D. K. Smith the sum of three thousand dollars, United States gold coin, as follows: One thousand dollars cash at the time of the delivery of said deed from said D. K. Smith to said Thomas F. Rourke, and said Thomas F. Rourke's negotiable promissory note for the balance of said purchase price, namely, two thousand dollars, which said note was afterwards and before the commencement of this suit and before notice of complainant's said mortgage and alleged lien fully paid and discharged; and defendants aver, that at the date and time of the said contract and sale and purchase of said land and premises, the defendant Thomas F. Rourke had no knowledge or notice whatever of the existence of complainant's said mortgage, or the alleged or any error therein, or of complainant's alleged claim or interest in or lien upon said lands and that the said defendant, Thomas F. Rourke, purchased said lands for the valuable and valid consideration aforesaid and in good faith.

And defendants allege that prior to the execution and delivery of said deed by said defendant, D. K. Smith, to said defendant, Thomas F. Rourke, and prior to the payment of the purchase price of said land as aforesaid, the said defendant, Thomas F. Rourke, had and caused the records of conveyances and mortgages of Umatilla county, State of Oregon, to be examined by a competent attorney, and that no lien or encumbrance was found to exist upon or against said land, and acting upon the faith of said examination and of said records, the said defendant, Thomas F. Rourke, purchased said land and premises and paid for the same without any knowledge or notice of the complainant's said mortgage, or of the alleged error therein, and without any knowledge or notice of any interest in or claim thereon, and thereafter the said Thomas F. Rourke and Lillian C. Rourke, his wife, by deed of warranty, bearing date the eighteenth day of June, A. D. 1887, conveyed said land and premises to the defendant Christina Cheeley, for a valuable and valid consideration, and the said defendant, Christina Cheeley, at the time of said conveyance to her by said Thomas F. Rourke and Lillian C. Rourke, had no knowledge whatever of complainant's said alleged mortgage, and the said Christina Cheeley, by virtue of said conveyance, took all the rights and interest in and to said lands and premises were in said Thomas F. Rourke and Lillian C. Rourke at the time of said conveyance.

And these defendants, and each and every one of them, deny all unlawful combination and confederacy in the complainant's bill of

complaint charged, without that that any other matters or things necessary for these defendants to make answer unto, and not herein or hereby well and sufficiently answered unto, confessed and avoided, traversed and denied, is true to the knoweldge or belief of these defendants.

All which matters and things these defendants are ready to aver, maintain and prove as this Honorable Court shall direct, and humbly pray to be hence dismissed with their reasonable costs and charges, in this behalf most wrongfully sustained, and defendants as in duty bound will ever pray.

A replication to the foregoing answer having been filed, evidence was taken and on final hearing the following decree was entered October 19, 1891.

(TITLE.)

DECREE.

This cause was heard upon the bill and supplemental bill, the answers, replication, testimony and exhibits, and was argued by Mr. William B. Gilbert, of counsel for the plaintiff, and by Mr. John J. Balleray and Mr. Edward N. Deady, of counsel for the defendants. On consideration whereof the Court finds that on April twenty-first, eighteen hundred and eighty-three, the defendants, Erven O'Harra and Julia O'Harra, were the owners of the southwest quarter of section two, in township four north, range thirty-two east, of the Willamette meridian; and that on said date defendants duly executed and delivered to the plaintiff a mortgage to secure the payment of certain promissory notes executed by said defendants on said date; that said property was erroneously described in said mortgage as the northwest quarter of section two, in township four north, range thirty-two east, of the Willamette meridian; that after the execution of said mortgage said defendants duly conveyed said southwest quarter of section two, in township four north, range thirty-two east, of the Willamette meridian, to the defendant, D. K. Smith, who duly conveyed the same to the defendants, Thomas F. Rourke and Lillian C. Rourke, and the said property was afterwards conveyed by warranty deed by said Thomas F. Rourke and Lillian C. Rourke to the defendant, Christina Cheeley, who now holds the legal title to the same; that said Christina Cheeley is a bona fide purchaser of said property, without knowledge of the claim of the plaintiff by virtue of the mortgage executed by said defendants, Erven O'Harra and Julia O'Harra, and that said plaintiff is not now entitled to have said description in said mortgage corrected, or to have said mortgage made a lien on said property; it is therefore

adjudged and decreed that said bill and supplemental bill be and the same are hereby dismissed, and that said defendants do have and recover of and from said plaintiff their costs and disbursements herein taxed at seventy-five dollars. (Signed) DEADY, J.

(Endorsed:) Filed October 19, 1891, R. H. Lamson, Clerk.

On April 1, 1892, petition for an allowance of an appeal was served and filed, and the following assignments of error made therein :

(TITLE.)

ASSIGNMENT OF ERROR ON APPEAL.

First — There was error in the decree of the Court rendered herein dismissing the complainant's bill, for that under the evidence taken and reported herein, and by the law applicable thereto, your petitioner was entitled to a decree decreeing your petitioner's mortgage in the bill set forth as a mortgage upon the southwest quarter of section two, township four north, range thirty-two east, Willamette meridian, and decreeing the foreclosure thereof, although executed upon the northwest quarter of section two, township four north, range thirty-two east, Willamette meridian.

Second — There was error in the finding and decree of the Court that the defendant Rourke was an innocent purchaser of the property in the bill of complaint referred to, and as such was entitled to hold the same free of the lien by the complainant sought to be charged thereon by its mortgage in the bill of complaint referred to, for that it doth appear by the evidence in the cause, and so the finding and decree should have been, that the defendant Rourke was not such an innocent purchaser, or a purchaser at all thereof, except subject to your petitioner's mortgage in the bill referred to and as such subject to the lien by your petitioner's bill sought to be charged thereon, and with full knowledge that the mortgage in the bill of complaint referred to was intended to be a mortgage upon the property by the said Rourke purchased and in the answer of said Rourke set forth.

Third — That it doth sufficiently appear from the evidence taken in the cause and so the finding and decree of the Court should have been, that at and prior to the purchase of the property by the defendant Rourke, in his answer set forth, the agents and attorneys of the defendant Rourke well knew that said mortgage of the complainant was intended to be executed as and for a mortgage upon the said property, the said southwest quarter of section two, township four north, range thirty-two east, Willamette meridian, and by the said defendant Rourke purchased, which said knowledge by the said attorneys and agents of the said defendant Rourke was obtained by

them in the course of the employment of them by the said Rourke in investigating and passing upon the right and title therein of the grantor of him, the said Rourke, preparatory to the purchase of the said property by the said Rourke, and which said knowledge of them, the said agents and attorneys of the said Rourke, should have been ruled to be the knowledge of him, the said Rourke, and by reason thereof the decree of the Court should have been that the purchase by the said Rourke, and in his answer set forth, was a purchase made by him with full knowledge of the complainant's equities in the bill set forth.

Fourth — There is error in the finding and decree of the Court that the defendant Christina Cheeley was a bona fide purchaser of the property sought to be charged by the complainant's lien and purchased the same without notice or knowledge of the complainant's equity in regard thereto, for that it doth sufficiently appear by the evidence taken and so the finding and decree should have been, that Christina Cheeley at and prior to the alleged purchase by her, alleged to have been made in the answer to the supplemental bill filed in the cause, had full notice and knowledge of the mistake in regard to the complainant's mortgage and that the same was intended to be and should have been a mortgage upon the property by her so purchased, and that the said property was subject to the complainant's claim to a lien by virtue of the complainant's mortgage in the bill set forth.

Fifth — There is error in the finding and decree of the Court, and in so much thereof as adjudges and decrees that Christina Cheeley was a bona fide purchaser of the property by her purchased and in her answer to the supplemental bill set forth, and upon which the lien of the complainant by its said mortgage was sought to be charged, for that it doth sufficiently appear by the evidence and by the supplemental bill and the answer thereto filed, and so the finding and decree should have been, that the said defendant, Christina Cheeley, purchased the said property by her purchased as in her answer to said supplemental bill set forth, from the said Thomas F. Rourke and Lillian C. Rourke, parties defendant to the original bill of the complaint, and after service thereof upon the said Thomas F. and Lillian C. Rourke, and while yet the said cause of complaint was pending and undetermined, which said purchase of the said Cheeley *pendente lite* should have been ruled and decreed by the Court as a purchase with full knowledge of the complainant's equities in the bill set forth.

Wherefore your petitioner prays allowance of an appeal from the decree rendered herein to the United States Circuit Court of Appeals for the Ninth Circuit, prays for a citation thereon and that your Honors

may be pleased to fix the amount of the bond upon such appeal, and in duty bound your petitioner will ever pray.

The foregoing petition being presented, an order of allowance was on the same day entered, bond for costs thereon in the sum of five hundred dollars ordered, which bond on the same day was presented, approved and filed, and citation upon such appeal duly issued and the same served upon the solicitor of record for defendants, and service thereof admitted by endorsement thereon, and on April 1, 1892, the original deed, plaintiff's exhibit "A" to the record was ordered certified with the transcript.

(TITLE.)

EVIDENCE UPON WHICH THE CAUSE WAS HEARD.

PLAINTIFF'S EVIDENCE.

ERVEN O'HARRA, a witness introduced on behalf of the plaintiff, being first duly sworn, testifies as follows :

By Mr. W. B. GILBERT.

Q. 1. State your name, age, residence and occupation ?

A. Erven O'Harra, I am 42 years old, I live in Umatilla county, and am a farmer.

Q. 2. Are you the Erven O'Harra who mortgaged some property, mentioned in this suit, to the American Mortgage Company of Scotland, Limited ?

A. Yes, sir.

Q. 3. State whether or not a mistake was made in describing the land you intended to mortgage, in making your mortgage to that company ?

A. Yes, sir, according to the records. I intended to mortgage the southwest quarter of section 2, township 4 north, of range 32 east, the only deeded land I ever owned ; the mortgage contained the "northwest" quarter of that section, and it should have been the southwest quarter. I gave them my filing papers to make out the description, which I supposed was right ; and they kept them here three or four weeks, or a month.

Q. 4. State when and how you ascertained there was a mistake ?

A. Well, I don't remember the time or how long afterwards it was, but Mr. Wirt Minor was the first one who ever told me there was a mistake. I think it was in the next spring ; perhaps in May, the second year afterwards, because D. K. Smith monkeyed with me all the following summer when I was following around after him to have the mistake corrected ; I tried hard to have it corrected after Mr. Minor told me of the mistake, but could not on account of Mr. Smith.

Q. 5. With whom did you negotiate the sale of that land ?

A. Sell it to—to Mr. Tommy Thompson.

Q. 6. State what conversation you had with Thompson about this mistake ?

A. Well, when I went to trade with Mr. Thompson I told him that the mortgage was not recorded right, but D. K. Smith would certify it was all right before we traded. He (Thompson) was to pay that mortgage off, and to pay J. C. Long \$327.00, Frank Murphy \$184.00, and give me \$100.00 besides and 200 acres of railroad land on Dry creek, in Umatilla county, Oregon. After I came back from seeing D. K. Smith I met Thompson down here on the corner, and he asked me what D. K. Smith had said; I told him Smith said it was all right, that he could go ahead and make the trade and he would bring a notary public out there and certify it. We went ahead then and made our trade.

Q. 6. Who was present when the deed was made?

A. Thomas Thompson was there, my wife; I think old man Kern was standing there, Smith was not there.

Q. 7. Why was the deed not made to Thompson?

A. I supposed it was at the time I signed it, I understood it was.

Q. 8. Did you have conversations with Thompson afterwards, as to why he had not paid off these debts that you have mentioned?

A. Yes, sir.

Q. 8. State what he said. (Objected to as immaterial, incompetent.)

A. I wanted him to set me back as I was before, so that I could go ahead and rectify it. He said he could not do it, because he had sold the place to D. K. Smith, and he told me what he got for it.

Q. 9. Did he give you any reasons why he had not paid off any of the encumbrances? (Same objection as last.)

A. He said D. K. Smith was to pay them, the same as he had to pay them off to me.

Q. 10. State what conversations, if any, you had with D. K. Smith, regarding the paying off of the incumbrances after that? (Same objection as last.)

A. Yes, I had a conversation with D. K. Smith. I think Mr. Long was present, he or Frank Murphy, one—I could not exactly say which; I asked Smith what was the reason why he didn't come and rectify that mistake; he said he was not paid by the Scotch Company to transact their business any more; then right there, I asked him if he didn't agree to pay the mortgage off, the same as Thompson had told me, and he said he had, but there was nothing against the place.

Q. 11. Did you have any talk with the defendant Rourke about this matter?

A. No, sir.

Q. 12. Did you have any talk with Cheeley about the place?

A. Yes, sir.

Q. 13. Was that before or after he bought it?

A. Before it; and since then, too.

Q. 14. What conversations did you have with him before he bought it?

A. Well, I don't remember; I had several; he lived pretty close to me and was my neighbor, and was pretty near the first man I told about the thing, I told him all about it. He says to me the other day, "You know that I am not an innocent purchaser," and that he didn't care if they did beat him out of the place, Tom Rourke was good for his money.

Cross-Examination waived.

Witness, after having the foregoing testimony read to him, says in explanation, that "I asked W. E. Crews, then present, to read the deed to me, but he said that he was in a great hurry and the papers were all right, and he wanted to get back to Pendleton before dark, and he did not read it to me." ERVEN O'HARRA.

THOMAS THOMPSON, being first duly sworn, introduced on behalf of the plaintiff, testifies as follows :

By Mr. GILBERT.

Q. 1. State your name, age, residence and occupation.

A. Thomas Thompson, I am thirty years old, I reside in Umatilla county, Oregon, and am a farmer.

Q. 2. Mr. Thompson, are you acquainted with D. K. Smith, and Mr. Rourke, who has just left the stand?

A. I am a little acquainted with D. K. Smith, and pretty well acquainted with Rourke.

Q. 3. Did you have a kind of a lease or agreement in regard to the crops on the land that was deeded from O'Harra to Smith?

A. Yes, I think I had a lease; I had a lease of the land for two years.

Q. 4. Who made this lease with you?

A. It was D. K. Smith.

Q. 5. Did he write it out?

A. I think he wrote it out himself.

Q. 6. Where was that?

A. As near as I can remember it was in his office, up here in the corner of the old warehouse.

Q. 7. Was that the warehouse of D. K. Smith & Co.?

A. I could not tell you to whom the warehouse belonged, because I was not acquainted in Pendleton any then.

Q. 8. Did you have any talk with Mr. Rourke about that lease before the deed was made to Mr. Rourke from Smith?

A. I could not tell for certain whether I did or not, for I don't know exactly when the deed was made; I don't think I had.

Q. 9. Did you hear anything about it at that time from either Smith or Rourke?

A. No; I did not know anything about the transaction whatever at that time.

Q. 10. How long was it after the land was deeded to Smith before you got your lease? Was it a part of the same transaction?

A. I couldn't tell you exactly how long it was, although it was some time afterwards.

Q. 11. Who first talked to you about buying that property from O'Harra?

A. D. K. Smith was the first man I heard talk of buying the land from O'Harra.

Q. 12. Did he get you to make negotiations for him for the purchase of it?

A. In the first place, I was talking of trading for it with O'Harra, and D. K. Smith claimed that he was working for the company that loaned O'Harra the money, and that he would not allow us to trade; he would enter a suit of equity, and he said that he wanted the land; that was what he told us on the road; and if O'Harra took the land that I had, he (Smith) would take O'Harra's land and stand good to me for the land O'Harra got from me. Smith was to take this land subject to all encumbrances.

Q. 13. What encumbrances were discussed?

A. There was some mortgage company and Mr. Long.

Q. 14. Do you know whether Smith refused to pay those encumbrances, soon after he got the conveyance?

A. Well, I don't know of his refusing to pay the company, but I heard him say in Pendleton here once that he would not pay Long. I could not tell you how soon after the deed was made this was, but I think it was within a month, anyhow.

Q. 15. State whether or not you ever had any talk with Mr. Rourke about these mortgages to the Scotch company and to Mr. Long? If so, state when the first conversation was had, and what was said?

A. I don't remember of having any conversation with Rourke about either of the mortgages at any time.

Q. 16. What were you to pay D. K. Smith as rent for that farm?

A. I was to get the use of the place for two years and \$1,000 for my place on Dry Creek.

Q. 17. Did you use the place for two years?

A. Well, I leased it to Cheeley and got the third of it.

Q. 18. Do you know whom he paid rent to after your lease expired?

A. If to any one, I think to Rourke, but I don't think he paid rent to any one, for the reason that the place was a summer fallow.

Q. 20. Where is that lease?

A. I couldn't tell you; I may have it at home, or it may be destroyed or misplaced; I have not seen it for some time.

Q. 21. Were there any witnesses to it.

A. I could not tell you that.

Cross-Examination waived.

And further deponent saith not.

THOMAS THOMPSON.

GEO. A. HARTMAN, being first duly sworn, and introduced on behalf of the plaintiff, testifies as follows:

By Mr. GILBERT.

Q. 1. Please state your name, age, residence and occupation.

A. Geo. A. Hartman, I am 37 years old, I am a farmer and live in Pendleton, Oregon.

Q. 2. Are you acquainted with the land formerly owned by Mr. Erven O'Harra in this county?

A. I have seen it, sir.

Q. 3. Was that land deeded to you at any time? If so, by whom?

A. It was; by T. F. Rourke and wife.

Q. 4. Did you deed it back to them?

A. I did.

Q. 5. For what purpose was that deeded to you. (Objected to as immaterial and incompetent.)

A. To indemnify me for having signed some notes for Mr. Rourke as his security.

Q. 6. When you deeded it back had you been released on that note?

A. I think so—on all of them, I am not sure.

GEORGE A. HARTMAN.



WIRT MINOR, a witness introduced by plaintiff, being first duly sworn, testifies as follows :

By Mr. GILBERT.

Q. 1. State your name, age residence and occupation.

A. Wirt Minor, I am 33 years old, I live in Pendleton, Oregon, and am an attorney at law.

Q. 2. How long have you been practicing law here, Mr. Minor?

A. Since August, 1883.

Q. 3. Are you acquainted with Erven O'Harra, D. K. Smith, Thomas Thompson, parties to this suit.

A. I am.

Q. 4. You may state whether or not you ascertained that the mortgage from O'Harra to plaintiff in this suit contained an erroneous description of O'Harra's land? If so, when and how you ascertained the fact?

A. Yes, I did. I can't say when, but it was prior to the transfer of the land from Erven O'Harra. I first learned from the records of this county that the land described in the mortgage was not the same land which was described in a duplicate receipt issued to Erven O'Harra, I think. I called Mr. O'Harra's attention to the matter afterwards, and he told me that it was a mistake and that he would make it right. I spoke to Mr. D. K. Smith regarding the matter, whom I believed to be an agent of the American Mortgage Company of Scotland, and he told me that he would get the mistake corrected.

Q. 5. Did you have any conversation with Smith in regard to the same matter after O'Harra deeded the land to him? If so, what was said? ( Objected to as immaterial and irrelevant.)

A. I did; I think it was very soon after the transfer; Mr. Smith told me he had bought the land and would make a good thing out of it, and thanked me for giving him the information regarding the mistake in the mortgage, saying in the same conversation that the American Mortgage Company had not used him right in some matters, and he would get even with them.

Cross-Examination waived.

WIRT MINOR.

J. K. EDMISTON, a witness introduced on behalf of plaintiff, being first duly sworn, testifies as follows :

By Mr. GILBERT.

Q. 1. State you name, age, residence and occupation?

A. J. K. Edmiston, I am 28 years old, reside in Walla Walla, Washington, and am a money-loaner.

Q. 2. Are you acquainted with defendant Cheeley, and his wife, Christina Cheeley?

A. Yes.

Q. 3. Did you have a conversation with Mr. Cheeley with regard to his interest in this land formerly owned by Erven O'Harra in the presence of Mrs. Cheeley? If so, state where and when this conversation occurred, and what was said?

A. Yes, sir, I did ; on two or three occasions, but more particularly about two years ago, on his ranch near Helix, in Umatilla county, Oregon, when I called on him and was in his house in the presence of Mrs. Cheeley, we were talking about the land and his title to it, and of the mortgage of the American Mortgage Company, and he told me without solicitation on my part that he knew of all the particulars regarding this mortgage, knew of its existence before he bought the place ; he further told me what he had agreed to pay for it. We talked the matter over very fully, and he very clearly told me, after repeating the whole story of the mortgage of the company on the place, that he knew all about it before he had anything to do with the land ; I spent quite a long time in the house, and his wife was present during our conversation.

Q. 4. In that conversation did he say anything about taking the title in his wife's name, or why that was done? (Objected to as leading and suggestive.)

A. I don't recollect fully enough on that point to be able to say definitely.

Q. 5. State whether or not that matter was mentioned, the fact of taking the title in her name? (Same objection.)

A. Yes ; that was mentioned ; he told me the deed was made out to his wife ; he wanted to have it in that way.

#### Cross-examination by Mr. BAILEY.

X.-Q. 1. When was it you had this conversation and where?

A. About two years ago, in the house on the quarter section adjoining the O'Harra quarter section.

X.-Q. 2. Was Mrs. Cheeley present during the whole of the time of this conversation with Mr. Cheeley which you have just related?

A. All the conversation that I have said passed between Mr. Cheeley and myself passed in the presence of Mrs. Cheeley.

X.-Q. 3. Was Mrs. Cheeley taking an active part in the conversation?

A. The greater part of the conversation was directly between myself and Mr. Cheeley ; but to what extent Mrs. Cheeley took part in it I cannot now remember.

X.-Q. 4. Did she take any part in the conversation, or make any statements at that time?

A. She took some part in the conversation, but to what extent I cannot remember.

X.-Q. 5. Do you remember anything that she stated at that time?

A. I cannot separate the statements made in the matter by her and by him. I can't remember what she said, or what he said.

X.-Q. 9. Why do you remember so distinctly what he said, but cannot remember what she may have said?

A. I have already stated the greater part of the conversation was with Mr. Cheeley ; my business in going there was with him, and in matters of that kind men in talking will come more to the point than women.

X.-Q. 7. She, then, in the conversation at that time was not at all times talking about this matter, was she?

A. Mrs. Cheeley joined in the conversation from beginning to end, so near as I recollect, and was in the room all the time I was there, which was considerable time ; but the greater part of the conversation was between Mr. Cheeley and myself.

X.-Q. 8. Can you recall a single statement made by Mrs. Cheeley at that time relating to this matter?

A. I can not recall the exact words spoken by either party at this time.

X.-Q. 9. In what capacity were you acting at that time, and in whose employ?

A. I was not in the employ of anyone. I was working on my own account and I called on Mr. Cheeley for the purpose of seeing this O'Harra land and his own land.

X.-Q. 10. Why were you desirous of seeing this O'Harra land?

A. Because Mr. Cheeley applied to me for a loan on it.

X.-Q. 11. You are now in the employ of the plaintiff in this case, are you not?

A. I am not—most distinctly not, and never have been.

X.-Q. 12. What interest have you in this matter?

A. No interest whatever. I have never made anything out of this case and never expect to make a cent out of this case.

X.-Q. 13. In whose employ are you?

A. My own employ. I am no one's servant and have not been for six years.

X.-Q. 14. Whom were you representing when you say Mr. Cheeley applied to you for a loan on this land?

A. I did not say I was representing any one; I was not representing any one.

X.-Q. 15. Whose money were you loaning at that time?

A. I was loaning the money of several different people in Walla Walla, and some relatives abroad; I was also, at times, sending applications for loans to several companies engaged in that business, but not as the representative of any of said companies.

X.-Q. 16. To whom was this application of Mr. Cheeley's addressed for a loan?

A. I do not now remember that Mr. Cheeley ever made out an application for a loan; he was over to Walla Walla about that time and he may have simply spoken to me about wanting a loan, giving no particulars.

X.-Q. 17. By whom have you been employed to assist the prosecution of this case?

A. I have not been employed by any one to assist in the prosecution of this case.

X.-Q. 18. Have you attended here at your own expense and voluntarily?

A. Yes; I have attended here at my own expense and voluntarily.

X.-Q. 19. Have you not taken a great deal of interest in procuring the attendance of witnesses at this time, and arranging for these depositions?

A. Not particularly so.

X.-Q. 20. State what you have done in that regard?

A. I have done nothing for the arranging of the taking of these depositions; I let Mr. Long know that the testimony in this case was to be taken to-day, and I sent to let Mr. O'Harra know.

X.-Q. 21. Did you write to any one else about the matter?

A. Yes.

X.-Q. 22. To whom?

A. I wrote to Mr. Carter.

X.-Q. 23. To any one else?

A. No.

X.-Q. 24. Did you ever write to Mr. Livingstone in Portland, Oregon, or consult with him about this case and the testimony?

A. Mr. Livingstone and I have several times spoken of this case in conversation; in my correspondence with him the matter has been mentioned.

X.-Q. 25. Is it not a fact that you have been investigating this case, consulting with the plaintiff, or its representatives, and that in fact you are now here in their interest, and under their instructions?

A. I am not here under their instructions ; I am here as a witness, the same as any other witness, and have no interest in swearing to anything but the truth.

X.-Q. 26. Why did you write to Mr. Long telling him of the time of this hearing and requesting him to inform Mr. O'Harra ?

A. Mr. Long and I have had several conversations about this case ; I told him about two or three weeks ago that I would let him know when this case came up ; Mr. O'Harra also has had several conversations with me about the same case, in which he had expressed himself as greatly wronged by some party or parties.

X.-Q. 27. How did you know that this case was coming up, and who informed you of the time of this hearing ?

A. Mr. Livingstone, of Portland, Oregon.

X.-Q. 28. Have you advanced any witness fees to any of the witnesses attending at this hearing, or to any officer serving a process ?

A. No.

After reading over the foregoing testimony the witness desires to add, in regard to cross-question No. 5, that the question was answered as follows :

I cannot separate the statements made in the matter by her ; I cannot remember definitely her conversation.

J. K. EDMISTON.

J. C. LONG, a witness, introduced on behalf of the plaintiff, being first duly sworn, testifies as follows :

By Mr. GILBERT.

Q. 1. State your name, age, residence and occupation.

A. John C. Long ; I am 52 years old ; I live in Umatilla county and am in the milling busiess.

Q. 2. Mr. Long did you have a mortgage from Mr. O'Harra, made subsequent to the mortgage to the plaintiff in this suit ?

A. Yes, sir, I did.

Q. 3. From what did you take the description to make out the description in the mortgage that you took ?

A. I turned to the record and drew from the American Mortgage Company's mortgage.

Q. 4. When did you ascertain that there was an error in your description ? (Objected to as immaterial.)

A. In the fall of 1884 or 1885, I can't be sure which ; I heard that this sale between Mr. Thompson and Mr. O'Harra had taken place, and learned at the same time that the Scotch Company's mortgage was wrong, on the wrong piece of land. Knowing that mine was a correct copy of their's it would be wrong too ; I went to see Mr. O'Harra, he said Mr. Thompson would pay me my money, that was the contract. Mr. Thompson, myself and Mr. O'Harra came to Pendleton. Thompson refused to pay me and said that D. K. Smith was to do the paying. I took steps to bring suit for the land, about that date the land was transferred from D. K. Smith to Thomas Rourke, supposed to be an innocent purchaser.

Q. 5. What steps did you take ?

A. I came to see Mr. Bailey and Mr. Turner was the first step I took, and I found they were retained by Mr. D. K. Smith and Mr. Thompson.

Q. 6. Did you explain to them what you wanted ?

A. Yes, sir ; they had been my attorneys in other cases before that.

Q. 7. Did they tell you they had been retained by Smith and Thompson ?

A. Yes, sir.

Q. 8. How long was that before the transfer to Rourke? (Objected to as immaterial and irrelevant.)

A. Well, it was within twenty-four hours; I found out within a few hours after I spoke to them that it was transferred to Rourke; I really don't know whether it was transferred when I talked with Bailey and Turner or after that, but I found out that it was transferred in a few hours (that or the next day) after the conversation.

Q. 9. In that conversation with the attorneys did they say anything about Rourke?

A. No, sir.

Q. 10. Did they give you any other reasons for not taking your case, than that they had been retained by Thompson and Smith?

A. No, sir.

Q. 11. After talking with those attorneys what further steps did you take, if any, to protect your rights?

A. I went to Mr. Cox's office; he was not at home; I then saw Mr. Slater and he insisted on me proceeding with the suit; not having confidence in his ability to carry it through, I concluded to drop it for the time being. Then I went to Mr. Minor and took Mr. O'Harra with me, and took judgement against Mr. O'Harra for \$327 and interest; that was right at the same time, I had not left town; it was all done at once.

[Counsel for defendants moves to strike out the latter part of the above answer, relating to judgement vs. O'Harra as immaterial, irrelevant, is not in response to the question asked, does not tend to prove any allegation of plaintiff's bill of complaint.]

Q. 12. When was it, in the course of those proceedings, that you learned that Rourke had a deed to the property?

A. It was within twenty-four hours from the time I came to town; I came in the evening and the next morning it was on record; Mr. Parkes, the deputy clerk, then told me it had just been put on record.

Q. 13. When was it you had this talk with Messrs. Turner and Bailey? Was it the evening you came, or on the next day?

A. It was on the evening I came to town.

Q. 14. Do you know whether or not the defendant Rourke was a partner with D. K. Smith at that time?

A. I could not say.

Q. 15. Have you ever had any conversation with Rourke about this matter?

A. I frequently have, sir; whilst he was in the clerk's office there, I remarked one day to him, "Tom, you ought to fix up that matter, and pay me the money that is on that O'Harra place;" he just remarked that he could stand to fix up my part of it, but the Scotch company's would be more than the place was worth. That was about all the talk I had with him.

Q. 16. In these talks did he, or did he not, say anything in regard to his knowled of these mortgages before he took the deed?

A. He never said anything at all in regard to them.

A. That is correct.

Q. 9. Was this transfer by D. K. Smith to you of the O'Harra property made whilst that warehouse business was being carried on, as you have stated?

A. I think it was; but I would not be absolutely certain.

Q. 10. Have you the original deed of this O'Harra land from Smith to you?

A. I have, I think.

Q. 11. Will you produce it here before the notary public at some time to which this case shall be adjourned?

A. I will, if I can find it.

Q. 12. Who drew up your deed?

A. J. J. Balleray, I think; at least he was the one whom I consulted in the matter.

Q. 13. Do you remember about when it was that you sold the land to Cheeley?

A. I do not.

Q. 14. Who negotiated that sale with you, and who paid you the money?

A. Mr. and Mrs. Cheeley were both here.

Q. 15. Whom did you make the bargain with?

A. It was made with Oliver Cheeley, I think.

Q. 16. Who paid the money?

A. Mrs. Cheeley gave her note.

Q. 17. Was there any money paid?

A. Not at the time of the transaction.

Q. 18. Did Mr. Cheeley join in the note?

A. I think not.

Q. 19. Where is the note?

A. I don't know.

Q. 20. Have they paid the note off?

A. Yes.

Q. 21. How long since?

A. I think it was paid when due — know it was, in fact; I don't remember when it was due.

Q. 22. Did you take a mortgage to secure it?

A. I did.

Q. 23. Do you know where D. K. Smith is now?

A. I do not.

Q. 24. When did you last hear from him?

A. I have not heard from him since he left here last, a year ago this fall last past.

Q. 25. Do you know where he went when he went from here?

A. I do not.

Q. 26. Have you sent him any money since he went away from here?

A. I have not.

Q. 27. Did you give him any of the money you got from Cheeley or Mrs. Cheeley for this land?

A. I did not.

Q. 28. Did you give Mr. Thompson any of it?

A. I did not.

Q. 29. Who got the rents of this land from the time you bought it of Smith to the time you sold it to Cheeley?

A. I did if there were any; I don't remember of there being any.

Q. 30. Did not Mr. Thompson get some of the rents?

A. The place was bought subject to a lease of Mr. Thompson's.

Q. 31. Did you understand that before you bought it?

A. Yes; Smith told me it was leased to some one, I didn't know who at the time I bought it.

Q. 32. Did he tell you for how long it was leased?

A. I think it was one crop.

Q. 33. Was it not two?

A. I think not.

Q. 34. What were the terms of that lease?

A. I don't know that there was any written lease in existence; it was verbal with me at least. It was, that Thompson should get either the crop that was on it, or the following crop, at the time I bought.

Q. 35. Was he to pay anything for it?

A. Not to me.

Q. 36. To whom was he to pay?

A. I don't know; it was an arrangement made before I got the land.

Q. 37. Do you know if he was to pay anything for it?

A. I do not.

Q. 38. Did he take off one crop after he deeded to you?

A. I think he did.

Q. 39. Did you take the next crop?

A. I don't think there was any more; if there was, it was very small; if strikes me that I got a very small amount of wheat one year off of it.

Q. 40. Did you have the title examined when you bought that property to see if there were any encumbrances on it?

A. I did.

Q. 41. Who examined it for you?

A. J. J. Balleray.

Q. 42. Did he say anything to you about a mortgage to the American Mortgage Company?

A. He did not.

Q. 43. Did he say anything to you about a mortgage to Mr. Long?

A. He did not.

Q. 44. Do you know whether he examined the records at that time?

A. I think he did; he gave me an abstract?

Q. 45. How much time did he take for the examination of it from the time you spoke to him?

A. I don't remember; couldn't say positively.

Q. 46. How long a time was it from the time Smith proposed to sell that to you, before you took the deed?

A. If my recollection serves me right, he spoke of it one evening, and I think the deed was made the next day.

Q. 47. When did you speak to Judge Balleray about examining the title?

A. My impression is, it was the following morning after I had agreed to take the land from Smith.

Q. 48. And how soon after that did he report to you on the title?

A. I couldn't say positively; but it seems to me it was within a very short time.

Q. 49. Did he come to your place of business and tell you it was all right?

A. I think not.

Q. 51. Did you come to his office?

A. I think I did.

Q. 51. Did you tell him to hurry the matter up?

- A. Not that I remember of.
- Q. 52. Did you record the deed the same day you got it?
- A. I think I left the deed with Balleray to be recorded; I do not know whether it was recorded that day or not.
- Q. 53. Was Smith owing you money at that time?
- A. I don't remember distinctly, but I don't think he was.
- Q. 54. Had he been owing you money before this?
- A. I don't remember, but I think not; no considerable amount any way.
- Q. 55. Was he considerably in debt at that time?
- A. I don't remember whether he was or not; I think he was involved some.
- Q. 56. Did he make several conveyances about that time?
- A. I don't remember of any.
- Q. 57. Had he been trying to sell this land for some time before that?
- A. Not that I know of; in fact I knew very little about such matters at that time.
- Q. 58. Had he ever spoken to you about selling it before the evening you mentioned?
- A. Not that I remember of.
- Q. 59. After Judge Balleray reported to you that the title was all right, as I understand you to say he did, did you go after Smith to come and sign the deed?
- A. I don't remember; in fact, I am not clear as to whether I left Balleray's office or not.
- Q. 60. Do you think you waited there until he examined the title, possibly.
- A. Possibly.
- Q. 61. Did Smith go with you when you went there that morning?
- A. I don't remember whether he came with me or not.
- Q. 62. When did you tell Judge Balleray to prepare a deed?
- A. Well, I couldn't say, at this day.
- Q. 63. Was it right after he went to the court house and returned?
- A. I couldn't say, but I presume likely it was.
- Q. 64. Did you then go after Smith to get him to come and sign the deed?
- A. As I stated before, I don't remember whether I did or not?
- Q. 65. Where was his place of business then?
- A. I am not sure that he had any; but if he had it was up in this warehouse above here that McKenzie and Cavanagh used to be at.
- Q. 66. Can you say now whether Smith went to Judge Balleray's office with you in the morning and staid there until the title was examined and the deed prepared?
- A. I cannot.
- Q. 67. Who witnessed the deed.
- A. I am not able to say just now, but I think Mr. Crews was in the office at the time.
- Q. 68. Where was Judge Balleray's office then?
- A. I think it was next door over the DeSpain building, as it then was.
- Q. 69. Was he then in an office by himself or associated with some one?
- A. I think the firm name at that time that he was connected with was Turner, Bailey and Balleray.
- Q. 70. Did D. K. Smith ever talk with you about any trouble he had had with William Reid, or the American Mortgage Company, regarding a certain loan?
- A. I would not be positive whether he did or not; I have heard him mention William Reid, but that is about the extent of it.

The examination here suspended until the witness shall produce the deed mentioned by him, to him from Smith, for which purpose the witness is excused until



9 o'clock A. M. on December 14, 1889; and further proceedings are adjourned until 9 o'clock A. M. of December 14, 1889, at the same place.

CHARLES H. CARTER, Notary Public.

PENDLETON, OREGON, OFFICE OF  
CHARLES H. CARTER, NOTARY PUBLIC, }  
9 o'clock A. M., December 14, 1889. }

Met pursuant to adjournment.

Present: W. B. Gilbert, Esq., counsel for plaintiff; D. W. Bailey, Esq., counsel for defendants; Charles H. Carter, notary public.

The examination of Thomas F. Rourke was then resumed, from yesterday's adjournment:

By Mr. GILBERT.

Q. 71. Have you produced the deed referred to on yesterday.

A. I have not; I couldn't find it.

Q. 72. What have you done with the deed?

A. I have never made any disposition of it; it should be among my papers somewhere.

Q. 73. If it is among your papers, will you make further search and find it?

A. I will make further search and endeavor to find it.

Q. 74. When did you see it last?

A. I do not remember, but I think I saw it when I made the deed to Mrs. Cheeley.

Q. 75. Did Smith make you a deed of those warehouses soon after this conveyance was made? (Objected to as immaterial.)

A. I don't remember when the warehouses were transferred.

Q. 76. Was it during that same year? (Same objection.)

A. I could not say.

Q. 77. Was it after this deed to the O'Harra land was made?

A. I could not say as to that.

Q. 78. Was that deed to the warehouses made to you for the purpose of putting that warehouse property out of the reach of Smith's creditors? (Objected to as immaterial, impertinent; and counsel further objects to this mode of examination of this witness, which seems to be a cross-examination rather than an examination in chief.)

A. It was not, to my knowledge.

Q. 78. Did you pay him for that warehouse property by giving him some notes?

A. I don't think that I gave him any notes in payment of the warehouse property.

Q. 79. Did he turn over other property to you at or about the same time? (Same objection as to question No. 77 supra.)

A. I do not remember.

Q. 80. You mean you do not remember whether he turned over other property to you, or if it was at or about the same time? (Same objection.)

A. I do not remember either.

Q. 81. Don't you know that he did turn over other property to you besides the warehouses? (Same objection as last.)

A. I don't think of any.

Q. 82. Did you not give him a note or notes which were given in payment for that warehouse property, or that and other property? (Same objection.)

A. I gave him notes in part payment of this O'Harra land ; I also gave him notes in a settlement that he and I had at one time.

Q. 83. Was that settlement at or about the time of this transfer of the warehouses. (Same objection.)

A. No.

Q. 84. When was it in relation to the transfer of the warehouses? Before or after? (Same objection.)

A. After.

Q. 85. How long after. (Same objection.)

A. As I do not remember the date of the transfer of the warehouses, I could not say.

Q. 86. What was the date of that settlement? (Same objection.)

A. I don't remember.

Q. 87. How do you know it was after the transfer of the warehouses?

A. Well, I don't know how I know ; but I know it was later than the transfer of warehouses, because I think a balance due on warehouses cut some figure in the settlement ; but I could not be positive about that.

Q. 88. How many of those notes were there? And what were the amounts of them? (Objected to same as in last above objection.)

A. I think there were two of them ; I don't remember the amount.

Q. 89. Can't you tell about the amounts? (Same objection.)

A. I think it was something over \$1500, both together. It was somewhere between \$1500 and \$2000 ; I can't remember exactly.

Q. 90. Did you pay those notes to Smith, or to some one to whom he had endorsed them?

A. They have not been paid yet.

Q. 91. Were those the only notes that you made him in the year 1884? (Same objection.)

A. The notes that I refer to were not made in 1884 ; I think they were made in 1888.

Q. 92. Did you not between the time of the transfer of that warehouse property to you, and the year 1888, make other notes to Smith than those you have referred to? (Same objection.)

A. I don't remember.

Q. 93. Did you not give Smith notes at the time of the transfer of that warehouse property to you, which were ostensibly given in payment for the warehouse property and other property transferred from him to you? (Same objection.)

A. No.

Q. 94. You remember now that you gave him no note whatever at or about the time of the transfer of the warehouse property to you?

A. I do not ; I would not say so.

Q. 95. What, then is your best recollection about the giving of the note at or about that time? (Same objection as last.)

A. It would be impossible for me to answer that question, for the reason, as I have before stated, I do not remember the time, the date of the transfer of the warehouse property.

Q. 96. If you knew the date of the transfer of the warehouse, could you then tell whether you gave a note to Smith at that time?

A. It might assist my memory, but I have been in quite active business for the last five or six years, and it is almost impossible for me to remember the particulars of transactions of this sort.

Q. 97. Did you have a good many transactions with Smith?

A. Not a great many.

Q. 98. Did you give him several notes?

A. I did.

Q. 99. What were the notes for? (Same objection as last.)

A. In settlement of trades and business transactions between us.

Q. 100. Did he not transfer some of these notes to other parties before they were paid? (Same objection.)

A. I don't know.

Q. 101. You don't remember, now, whether you ever paid any of Smith's notes to any other person, or wholly to him?

A. I do not.

Q. 102. Have you ever stated in regard to any of those notes that Smith had no right to transfer them? (Same objection.)

A. Not that I remember of; I don't think I did.

Q. 103. Have you ever complained of his transferring those notes before they were due, and have you ever said, in connection with that, that it was not the intention that those notes were ever to be paid; that the property for which the notes were given were transferred from Smith to you to help Smith out of his troubles, or to put his property beyond the reach of his creditors, or words to that effect? (Same objection.)

A. I have no recollection of making such a statement, and I don't think I ever made such a statement.

Q. 104. You had your final settlement with Smith in 1888, you say?

A. Yes.

Q. 105. That was when Smith was here in Pendleton, was it not? (Same objection.)

A. It was.

Q. 106. What time in 1888 was that? (Same objection.)

A. I don't recollect.

Q. 107. How long were those notes to run that you gave on that settlement? (Same objection.)

A. Something over one and two years respectively.

Q. 108. Is one of them over due now? (Same objection.)

A. I think not.

Q. 109. When will the first one be due? (Same objection.)

A. The first of January, I think.

Q. 110. And when will the next one be due? (Same objection.)

A. The first of January, 1891, I think.

Q. 111. Who holds those notes? (Same objection.)

A. I have no definite knowledge who holds them; but I think they are in the hands of the Pendleton Savings Bank.

Q. 112. Don't you know they are in the bank? (Same objection.)

A. I do not.

Q. 113. Then why do you think they are there?

A. From hearsay.

Q. 114. Did you get your information from some officer of the bank, or employe? (Same objection.)

A. I don't recall now that any officer or employe of the bank has mentioned it to me; certainly not in an official way.

Q. 115. How many times did Smith speak to you about selling this O'Harra property before you bought it? (Same objection.)

- Q. 104. You had your final settlement with Smith in 1888, you say.
- A. Yes.
- Q. 105. That was when Smith was here in Pendleton, was it not? (Same objection.)
- A. It was.
- Q. 106. What time in 1888 was that? (Same objection.)
- A. I don't recollect.
- Q. 107. How long were those notes to run that you gave on that settlement? (Same objection.)
- A. Something over one and two years respectively.
- Q. 108. Is one of them over due now? (Same objection.)
- A. I think not.
- Q. 109. When will the first one be due? (Same objection.)
- A. The first of January, I think.
- Q. 110. And when will the next one be due? (Same objection.)
- A. The first of January, 1891, I think.
- Q. 111. Who holds those notes? (Same objection.)
- A. I have no definite knowledge who holds them; but I think they are in the hands of the Pendleton Savings Bank.
- Q. 112. Don't you know they are in the Bank? (Same objection.)
- A. I do not.
- Q. 113. Then why do you think they are there?
- A. From hearsay.
- Q. 114. Did you not get your information from some officer of the bank, or employe? (Same objection.)
- A. I don't recall now that any officer or employe of the bank has mentioned it to me; certainly not in an official way.
- Q. 115. How many times did Smith speak to you about selling this O'Harra property before you bought it? (Same objection.)
- A. I don't remember; I think we only had one conversation about it.
- Q. 116. When was that conversation with reference to the time the deed was made? How long before? (Same objection.)
- A. My impression is that it was the afternoon or evening before.
- Q. 117. Did he tell you he had just bought it? (Same objection.)
- A. I don't remember as to his having made any statement.
- Q. 118. Did he tell you whom he had bought it from? (Same objection.)
- A. I have no recollection as to his having told me that.
- Q. 119. Did you know whom he had bought it from? (Same objection.)
- A. I don't think I did.
- Q. 120. Had you ever seen the land? (Same objection.)
- A. I could not be positive now whether I had or not; it seems to me that about that time — either before or after — we went out there and he showed it to me; I had spoken to him some time before about getting me a piece of land.
- Q. 121. How did you go out there to see it? (Same objection.)
- A. We went in a buggy.
- Q. 122. Was O'Harra there?
- A. I don't remember meeting him.
- Q. 123. Was that before you got your deed? (Same objection.)
- A. I could not say whether it was before or after; it was about that time.
- Q. 124. How long did it take you to go out there and see it, and come back? (Same objection.)
- A. I could not say; at this time, I don't remember much about it.

Q. 125. How far is it out there? (Same objection.)

A. About eleven (11) or twelve (12) miles, I should say.

Q. 126. If you went there before the deed was made, you must have gone there the day before the deed was made, must you not? (Same objection.)

A. Quite likely, if I went before the deed was made.

Q. 127. Did Smith tell you how much he paid O'Harra for the land? (Same objection.)

A. No; not to my recollection.

Q. 128. Did he tell you whether he had had the title examined before buying? (Same objection.)

A. I don't remember as to that; I remember asking him if the title was good, and he suggested that I have an abstract made of it; and he assured me that the title was all right, at least I think he did, but I will not be positive as to that.

Q. 129. Was O'Harra there in possession at the time you went out to see it? (Same objection.)

A. I don't remember.

Q. 130. Was anybody there? (Same objection.)

A. I could not say; I don't remember if there was or not; in fact, I am not sure that we went to the house; we went to one corner of the land in a cauyon.

Q. 131. This settlement you had with Smith in 1888 was a final adjustment of all matters between you, was it not? (Same objection.)

A. It was so far as we knew then.

Q. 132. Have any matters arisen since to disturb that settlement?

A. Not so far as I know.

Q. 133. Do you claim to have any offset to those notes? (Same objection.)

A. I do not; it would do me no good if I had.

Q. 134. Was the balance due on this land figured into that settlement? (Same objection.)

A. I think notes for a portion of it were.

Further proceedings herein are adjourned to the same place at 1 o'clock P. M., it being now the noon hour.

CHARLES H. CARTER, Notary Public.

Met pursuant to adjournment; present, the same parties as in the morning session.

Examination of T. F. Rourke continued, as follows:

By Mr. GILBERT.

Q. 135. Have you found that deed from Smith to yourself yet?

A. Yes, sir; here it is.

(Witness produces deed, which is now offered in evidence and asked to be markee "Plaintiff's Exhibit A," and the same is now filed in evidence and so marked.)

Examination in chief here closed.

Cross-examination waived.

And further deponent saith it not.

T. F. ROURKE.

E. W. FARROW, a witness introduced on behalf of plaintiff, being first duly sworn, testifies as follows:

By W. B. GILBERT, Esq.

Q. 1. State your name, age, residence and occupation?

A. E. W. Farrow; I am 32 years old; I reside in Pendleton, Oregon, and am an abstractor, etc.

Q. 2. Did you in 1884 discover from the records an error in the description of the land Erven O'Harra mortgaged to the plaintiff herein.

A. I did make such discovery and so informed Mr. Cavanagh but do not remember if it was in 1883 or 1884.

Q. 3. Was it before or after the land was deeded to D. K. Smith?

A. It was before that.

Q. 4. Who was Cavanagh at that time?

A. He was agent, or correspondent to the "Scotch Loaning Company."

Q. 5. Where was he when you told him of this mistake?

A. In his office on Court street in Pendleton, Oregon.

Q. 6. Who was in the office at the same time besides you and him?

A. D. K. Smith, and I think Mr. J. H. Raley.

Q. 7. Do you remember whether Mr. Rourke was there?

A. I do not.

Q. 8. Was Mr. Rourke in company with D. K. Smith at that time or was he not?

A. They were together a good deal of the time, as far as I know.

Q. 9. What did Cavanagh do in pursuance of that information that you gave him?

A. He told me he was going to Portland that night, and would send up a new mortgage describing the right land; and I think a new mortgage came up to D. K. Smith; I am not positive of that, though, but I think it came; Smith being the manager of Cavanagh's business.

Q. 10. Did you have any talk with Smith about this matter at that time?

A. I could not say positively whether I did or not, but I think I did; that is when the new mortgage came back.

Q. 11. How soon after you told Cavanagh of this defect was it that Smith bought the land from O'Harra?

A. I don't remember; I think the first I saw of it was the deed.

#### DEFENDANT'S EVIDENCE.

JOHN H. BALLERAY, a witness introduced on behalf of defendants Rourke and others, for whom he has appeared as counsel heretofore, being first duly sworn, testifies as follows:

By Mr. D. W. BAILEY, Esq., of counsel for defendants.

Q. 1. State your name, age, residence and occupation?

A. John J. Balleray; I am thirty-five years old; I reside in Pendleton, Oregon, and am an attorney and counsellor at law.

Q. 2. State where you have resided for the five years last past, and in what business you have been engaged?

A. I have resided in the town of Pendleton except for about two months, and have been engaged during that time in the practice of law.

Q. 3. Are you acquainted with the defendant, T. F. Rourke? If so, how long have you known him?

A. I am acquainted with Mr. T. F. Rourke, and have known him for about six years.

Q. 4. State whether or not you were ever consulted by him as an attorney relating to the purchase of the land in controversy herein from D. K. Smith? And if so, state in detail what transpired in regard thereto?

A. I was consulted by Mr. Rourke, not about the purchase of the land but with reference to the title. Mr. Rourke came to the office and gave me a description of the land and asked me to examine the title and see if it was all right. I made a search of the records of Umatilla county and made an abstract of the title which I gave to Mr. Rourke.

Q. 5. Examine this piece of paper and state, if you know, what it is and who prepared it? (Here counsel gives the witness certain papers.)

A. This is the abstract that I furnished to Mr. Rourke, except the certificate from the United States Land Office attached thereto and the card from the Northern Pacific Land Office; and I think that is all of the abstract, although I don't know. (Witness here examines the papers again closely.) Yes, that is all the abstract I gave him.

Counsel for defendants here offers the instruments and papers just handed witness in evidence, and asks that it be filed and marked as Exhibit A of defendants' proofs herein.

Q. 6. Did you give Mr. Rourke any advice in regard to the condition of the title to this land, other than that which is stated in the abstract marked Exhibit A? If so, what was it?

A. Yes; I told him about the same thing that is in the certificate, that the title was all right, and that there were no liens on the land, except it might be judgments in the United States Court; I told him we were not in the habit of searching the records of that Court where we knew the parties and knew that they were not likely to have judgments entered against them; I think I suggested to him that he might write to the clerk if he thought best; but he didn't seem to think that Mr. Smith or Mr. O'Harra were at all likely to have had judgments against them entered in that court.

Q. 7. When was this advice given and abstract made?

A. I think it was in the summer or spring of 1886, but do not know, except by reference to the abstract; that appears to have been on September 22, 1884.

Q. 8. Is that when the abstract was furnished and advice given, on September 22, 1884.

A. The abstract is dated as of the day I made the examination of title; the advice was given the same day or the next day; I think it was the next day.

Q. 9. Do you know what, if anything, was paid by Rourke to Smith as the purchase price of the land? If so, state all you know about it?

A. I think I drew the deed from Smith to Rourke the day after the abstract was made, or the same day, I will not be sure which; Mr. Rourke and Mr. Smith came to the office; I don't know whether they came together or not; I know they were in there together and talked the matter over a little while; they looked at the deed from Smith to Rourke, it was in my possession, and I think I had prepared it; Mr. Rourke then paid an amount of money in gold coin, I think it was \$700.00 or \$1,000.00, I can't be sure which it was; it was a thousand dollars some way in the transaction; I don't know whether that was the balance due or if it was actually the coin paid.

Direct examination here closed.

## CROSS EXAMINATION OF J. J. BALLERAY.

By Mr. GILBERT, for plaintiff.

X.-Q. 1. Did you examine the title on the same day on which Rourke first spoke to you about it?

A. Yes, I did.

X.-Q. 2. Did you prepare the deed also on the same day?

A. I am not sure about that, but I think I prepared it either that evening or the next day; my impression is that I prepared it the next morning.

X.-Q. 3. Did not Mr. Rourke come to your office and ask you to make an examination of that title, and did he not wait in your office until you had finished the examination and prepared the deed?

A. No, I think not; of course, whilst I was examining the title I don't know where Rourke was, and he might have been in the office; my present recollection is, that the transaction was not closed until the next day; I know the first time Rourke came up, he came alone and told me what he wanted, and I know he came back again and I explained the condition of the title to him, then I know that he and Smith afterwards came to the office at the time the deed was delivered and the money paid; I think the time when Smith and Rourke were in the office together was the day after I examined the title.

X.-Q. 4. In examining the title, did you find mortgages from Erven O'Harra on the northwest one-quarter of section two?

A. I have no recollection as to whether I did or not; I presume I did from the fact that I subsequently learned of the existence of such a mortgage.

X.-Q. 5. You examined the record to see if there was any mortgage made by Erven O'Harra, did you not?

A. Yes; I looked to see if there were any mortgages made by Erven O'Harra, and then looked to see if the mortgages covered this land; if they did not of course I took no notice of them.

X.-Q. 6. If you found a mortgage of record on the northwest one-quarter of section two, from Erven O'Harra, would you not inquire further to see if there was not a mistake in the description?

A. No, not unless there was something to put me on inquiry.

X.-Q. 7. How long had you known Erven O'Harra?

A. I don't know that I know him now; I did know that there was such a man in the county and know his business, but don't think I had any personal acquaintance with him.

X.-Q. 8. When you started to write the description in the deed did you not commence the northwest one-quarter of section two, and change it to the southwest one-quarter of section two?

A. I don't know.

X.-Q. 9. Did Rourke give you a written description of the property he wanted you to examine?

A. I don't know whether he brought to me a written description or whether he told me what property it was and I took it down.

X.-Q. 10. Was he in a hurry to have the examination made and the deed drawn?

A. I don't know — he did not say anything to me about that. I should infer not for the reason that Mr. Bailey told me the morning before I saw Mr. Rourke, that Rourke wanted the title to some property examined and that he was busy,



and when Rourke should come up I had better do it ; I have no recollection at this time that he requested any haste about the matter.

X.-Q. 11. Did D. K. Smith say anything to you about the matter before he came to you to sign the deed?

A. No.

X.-Q. 12. Were you acquainted with J. C. Long at that time?

A. I think I was.

X.-Q. 13. Do you remember his coming to your office to engage the services of your firm, either the day you examined that title or the day before, concerning his rights in the premises, and regarding the mistake in the description in his mortgage or O'Harra's property?

A. No, I don't recollect his coming to the office at any time ; I know he did not come the day I examined the title nor the day after when I was present, if he had I certainly would recollect it, and I know for the further reason that I did not learn of the misdescription in the mortgage in this case, or in the Long mortgage until long after the transaction, it must have been about a couple of months or three months ; Long spoke to me once, and my recollection is that was on the street ; he said something about this mortgage of his, said something about submitting it to Mr. Leasure ; that is the only conversation I ever had with Mr. Long about the matter.

X.-Q. 14. Did you ever know that Mr. Long consulted with Judge Turner, of your firm, about this matter, either the day that you examined the title or the day after, and that Judge Turner told him that your firm could not take his case for the reason that they were retained by the other side.

A. No.

X.-Q. 15. In what way did you first learn that there was a mistake in the description in O'Harra's mortgage to the Scotch company?

A. I first learned that in a casual conversation ; I don't know whether it was on the street or where, but several parties were discussing loans made by the Scotch companies in Umatilla county, and the fact that they had loaned on inadequate security and the number of mistakes that had been made, and this one was mentioned among others ; and it attracted my attention, because I remembered having examined the title.

#### RE-DIRECT EXAMINATION.

By D. W. BAILEY, Esq.

Q. 1. At the time you prepared this abstract and gave Mr. Rourke this advice you have mentioned, in regard to the title to this tract of land, did you have any knowledge or notice or intimation of the existence of the mortgage executed by defendant O'Harra which was intended to cover the land, the title of which you looked up for Rourke?

A. No, sir.

And further deponent saith not.

JOHN J. BALLERAY.

THOMAS F. ROURKE, one of the defendants, introduced on behalf of defendants appearing, being duly sworn, testifies as follows :

Q. 1. What was the consideration paid by you to D. K. Smith for the land in controversy herein?

A. The consideration was \$3,500.00 for this and a quarter of railroad land adjoining, which he quit-claimed to me.

Q. 2. How was that money paid?

A. One thousand dollars cash and \$2,500.00 in notes.

Q. 3. When was the money paid, and when were the notes given?

A. On the day of the delivery of the deed, the 23d day of September, 1884, I think it was.

Q. 4. Have those notes since been taken up.

A. They have.

Q. 5. At the time of the purchase of this land and the execution and delivery of the deed and payment of the purchase price, as you have stated, did you have any knowledge, or intimation or notice of any kind of the existence of a mortgage executed by defendant, Erven O'Harra, which was intended to cover the land purchased from Smith in controversy in this case.

A. I did not.

Q. 6. Did you buy the land in good faith, believing that you were getting a good title?

A. I did or I should not have bought it.

#### CROSS-EXAMINATION OF T. F. ROURKE.

By Mr. GILBERT.

X.-Q. 1. Were there two parcels of land deeded you in one conveyance?

A. No.

X.-Q. 2. Were they deeded at the same time?

A. Yes; I think they were.

X.-Q. 3. Were the deeds delivered and recorded at the same time?

A. I think they were.

X.-Q. 4. Did you pay the \$2,500.00 notes in cash?

A. I paid one of them in cash; they were for \$1,250.00 each, due in one and two years, the other was included in a settlement between Smith and me.

X.-Q. 5. When was that settlement?

A. I think it was in 1886, or in the winter of 1886-1887.

X.-Q. 6. Did you get that note surrendered to you at that time?

A. I did.

X.-Q. 7. Have you got that note yet?

A. I think I have some where, in my possession among my papers.

X.-Q. 8. Will you produce it here before the notary?

A. I will, if I can find it.

X.-Q. 9. Did you see either of these tracts of land before you bought them?

A. I think I did; I think we went out there a day or so before I bought them; I am sure as to the time.

X.-Q. 10. Did you see both pieces?

A. I did.

X.-Q. 11. Who went with you?

A. Smith.

X.-Q. 12. How long was that before you bought?

A. I could not say.

X.-Q. 13. When did you agree to buy these parcels of land?

A. I could not remember the exact date; a day or so before the deeds were passed.

X.-Q. 14. And how long was it after you went out to see the lands?

A. Oh, I could not say positively, well, it is likely the trade was concluded right away after we examined it, but I can't tell now.

X.-Q. 15. Do you say now, for certain, that you ever saw that land before you bought it?

A. I do not; my impression is however, that I bought it; either before I bought it or a day or two afterwards.

X.-Q. 16. Did you see O'Harra there the day you went out?

A. I don't recollect; I did not know O'Harra then; don't know for that matter.

X.-Q. 17. Did you go over the place?

A. I did.

X.-Q. 18. Did you stop at the house?

A. I went by the house, did not go in.

X.-Q. 19. Did you hitch your buggy and walk over the place?

A. My impression is, not; we drove over the place.

X.-Q. 20. In figuring the price of those two tracts of land, how much was apportioned to each?

A. One thousand dollars to the railroad land and \$2,500.00 to the deeded land, was what we talked.

X.-Q. 21. Did you have any understanding with Smith that in case you failed to get title to this deeded land free from incumbrances, that those notes should not be paid?

A. I did not.

X.-Q. 22. When did you pay him that first note?

A. The note was paid here in Pendleton.

X.-Q. 23. Did you pay it to him?

A. Not personally, no.

X.-Q. 24. To whom did you pay it?

A. I paid it to Mr. Bailey; I don't think Smith was here when it came due?

X.-Q. 25. Did Mr. Bailey have it for collection, or did he own it?

A. I did not inquire into that particularly; my impression at the time was that he had it for collection.

X.-Q. 26. Did you pay him the full amount of it in coin?

A. I don't recollect now whether I paid it in coin or gave a check for it?

X.-Q. 27. Did D. K. Smith go with you to Mr. Balleray's office at the time you requested him to examine the title?

A. I think not.

X.-Q. 28. Did you give Judge Balleray a description of the property you wished him to examine?

A. I did.

X.-Q. 29. From what did you give it?

A. Well, I presume it was from a memorandum that I had made of the numbers as given me by Smith.

X.-Q. 30. Did you wait in his office while he made the examination?

A. Why, I am not positive as to that; but I don't think I did.

X.-Q. 31. Was the deed signed the same day that he examined the title?

A. I think it was on the following day.

X.-Q. 32. Who had the deed recorded for you?

A. Mr. Balleray, it is my recollection ; I left the deed with him to have it recorded.

X.-Q. 33. Did he say anything to you at that time about any mortgages on O'Harra's land ?

A. I don't recollect.

X.-Q. 34. When did you first find out that there was a mistake in mortgaging that land to the Scotch company ?

A. It was several months after this transaction.

X.-Q. 35. Who told you ?

A. I think it was Judge Balleray who first told me.

X.-Q. 36. Did you say anything to D. K. Smith about this ?

A. I did, the first time I met him after this.

X.-Q. 37. What did he say ?

A. He assured me that it could in no way affect my title to the land ; that the records did not show any lien or claim against the land.

X.-Q. 38. When you paid the first note, did you make any objection to paying on account of this incumbrance to the Scotch company ?

A. I don't know that I made any objection at the time ; but Smith and I had discussed the matter before the note came due, and I think he told me he had transferred the note—sold it.

X.-Q. 39. Whom did he say he had sold it to ?

A. He did not say.

X.-Q. 40. Did you ask him ?

A. I don't remember that I did.

X.-Q. 41. When you paid Mr. Bailey, did you inquire who owned the note ?

A. I don't remember of doing so.

X.-Q. 42. Did you learn who owned the note ?

A. I did not.

X.-Q. 43. How long was the note over-due when you paid it ?

A. I don't remember that it was over-due at all ; I think I paid it when it was due.

X.-Q. 44. Did you ask for an indemnity against this mortgage to the Scotch company, at or before the time you paid the note ?

A. I don't think I did.

X.-Q. 45. Did you ask for any indemnity before you paid the second note ?

A. No.

X.-Q. 46. When was that settlement had in which that second note was taken up ?

A. In the fall of 1886 or spring of 1887, along that time.

X.-Q. 47. Do you owe D. K. Smith any money now ?

A. I do not.

X.-Q. 48. Does he owe you money ?

A. He does not.

X.-Q. 49. Have you had any dealings with him since that settlement you referred to ?

A. Yes ; I had a further settlement with him in the fall of 1888.

And further deponent saith not.

T. F. ROURKE.

PLAINTIFF'S EXHIBIT A.

A copy of deed for the land in controversy from D. K. SMITH to THOMAS F. ROURKE, the original of which has been certified for inspection.

DEFENDANT'S EXHIBIT A.

NORTHERN PACIFIC RAILROAD, LAND DEPARTMENT, PACIFIC DISTRICT.

LAND DEPARTMENT,  
JULY 15, 1880, W. T.,  
NORTHERN PACIFIC RAILROAD COMPANY. }

Your application to purchase northwest quarter section 11, township 4 north, range 32 east, has been placed on file.

Before any timber can be cut on the above described land, except that used in the improvement of the same, there must be an absolute purchase of the land.

A mere application to buy land confers no right or privilege; actual settlement or improvement of such character as will be evidence of your intention to purchase, is necessary before any right by virtue of your application is obtained.

It is not the intention to give the holder of this receipt the right to dispossess any one who has previously settled upon or improved the land described, unless the same has been really abandoned.

Lands valuable for any other than strictly agricultural purposes are, at the option of the company, reserved. J. W. SPRAGUE, General Superintendent.

(Endorsed:) New Tacoma, July 16, 1880, Washington Territory.

ERVEN O'HARRA, Weston, Oregon.

DUPLICATE.

No. 1425.

RECEIVER'S OFFICE AT LA GRANDE, OREGON, }  
MAY 18, 1883. }

Received from Erven O'Harra of Helix, Umatilla county, Oregon, the sum of \_\_\_\_\_ dollars and \_\_\_\_\_ cents; C. D. S. No. 1248, dated April 10, 1883, by Milton Pomeroy, in 1st Nat. Bank, Portland, Oregon, for \$200.

C. D. S. No. 1249, dated April 10, 1883, by Milton Pomeroy, in 1st Nat. Bank, Portland, Oregon, for \$200.

S. W. ¼ quarter of section No. 2, in Township No. 4 North, of Range No. 32 E. W. M., containing 160 acres and \_\_\_\_\_ hundredths, at \$2.50 per acre. on pre-emption No. 2961. GEO. B. CURREY, Receiver.

\$1.25 fees of Reg. and Rec. for examing testimony &c.

(Endorsed:) Erven O'Harra.

STATE OF OREGON, }  
COUNTY OF UMATILLA. } ss.

I hereby certify that the within instrument was received for record on the 21st day of May, 1883, at 9 o'clock A. M., and duly recorded by me in book I, Record of Deeds, on page 765 of said county. Witness my hand,

J. P. BUSHEE, Clerk.  
By C. P. EDMUNDS, Deputy.



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